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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 754

WILLIAM H. REDDING,

Appellant,

vs.

CITY OF LOS ANGELES, HON. FLETCHER BOWRON, MAYOR THEREOF; C. B. HORRALL, CHIEF OF POLICE; JOSEPH F. REED, ASSISTANT CHIEF OF POLICE; JAMES F. LAWRENCE, CHARLES R. MESLOH, B. R. STEED, HENRY S. EATON, BRUCE F. CLARK, ANTHONY COLLINS, THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES, JUSTIN W. GILLETTE, ROBERT M. HIXON, IDA S. LAZARD, SAMSON A. LINDAUER, DR. FREDERIC P. WOELLNER AND L. V. McCARDLE, AS TREASURER OF THE CITY OF LOS ANGELES

JURISDICTIONAL STATEMENT

Jurisdiction is conferred by Title 28, sec. 344, U. S. C., which provides as follows:

> (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in

question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon an appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.

Title 50, U. S. C. A., secs. 1471, 1472, 1474 (Appendix, Ex. B).

Los Angeles City Charter, secs. 17, 125, and 202 (Appendix, Ex. C).

Title 46, U. S. C. A., sec. 1101 (Appendix, Ex. F).

Opinion Below

The opinion of the District Court of Appeal is reported in 81 A. C. A. (No. 13), p. 1055, a copy of which is attached

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hereto in the Appendix and made a part hereof, marked Ex. A.

Questions Involved

The questions involved in this case are whether the Los Angeles City Police Department is bound by the national policy expressed in the Act of Congress, that members of the merchant marine, who served honorably during the war, are entitled to reemployment rights with the Los Angeles Police Department, and that such service in the merchant marine, as a matter of national policy, does not constitute neglect of duty, because after leaving the armed forces petitioner herein served in the United States merchant marine honorably and received a certificate of discharge from the said merchant marine. The question involved, therefore, is whether Title 50, sections 1471 to 1474, U. S. C. A., and the various Acts of Congress relating to the merchant marine, are binding on the Los Angeles Police Department, and whether sections 17 and 202 of the Los Angeles City Charter are bound by the Acts of Congress, Title 50, sections 1471 and 1472, U. S. C. A., Chapter 142, sec. 2, 57 Stat. 162. A copy of sections 1471, 1472 and 1474 is attached hereto in the Appendix and made a part hereof, marked Ex. "B." There is also attached in the Appendix and made a part hereof a copy of sections 17, 125 and 202 of the Los Angeles City Charter, marked Ex. "C." House of Representatives Reports 106, 78th Congress, 1st Session, and 1651, 79th Congress, 2d Session, show that it was clearly the Congressional intent to reemploy persons who entered the merchant marine. Copies of said reports are attached hereto in the Appendix, marked Ex. "D." A copy of U. S. War Shipping Administration Report to the President, pages 29-32, dated January 15, 1946, is attached hereto in the Appendix, marked Ex. "E."

The Facts

This is an appeal from a decision of the District Court of Appeal, Second Appellate District, Division 2, of the State of California, filed October 17, 1947. A petition for rehearing was filed in the said Court on October 31, 1947, and denied on November 4, 1947. A petition was thereafter, on November 26, 1947, filed with the Supreme Court of the State of California for a hearing and was denied by the said Court on December 15, 1947. A petition for an appeal was filed in the District Court of Appeal of the State of California on or about March 4, 1948, and within three months from the denial of a hearing in said cause by the Supreme Court of the State of California, this being the highest court of the state which could review the same. A hearing being denied by the Supreme Court of the State of California, the judgment of the District Court of Appeal became final on December 16, 1947.

The Federal questions involved herein are, whether a city in its police force and its charter provisions governing the reemployment of police officers who went into the military service of the United States and thereafter into the merchant marine are entitled to reemployment and reemployment rights after leaving the merchant marine, or whether the service of such officers in the merchant marine constituted "neglect of duty" for which an officer could be discharged by the city and all of his rights of approximately 19 years previous service terminated.

This case involves the interpretation of this Court of the Congressional intent and purposes in adopting the Act of June 23, 1943, chapter 142, section 2, 57 Stat. 162, and the provisions of Title 50, sections 1471, 1472 and 1474, and whether the city in its Police Department is bound by the national policy laid down by the Act of Congress regarding reinstatement of former members of the merchant marine.

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The question was first presented in the Superior Court of the State of California in and for the County of Los Angeles in a petition for a Writ of Mandamus to compel the City of Los Angeles to reinstate the petitioner to his office and rank as a member of the city Police Department. It was therein alleged that the petitioner became a member of the Los Angeles City Police force on the 1st day of April, 1925, and continued until September 6, 1942, when he entered the United States coast guard on military leave; that prior to the petitioner having become a police officer, he had entered and served in the United States navy for three years and had been honorably discharged from the navy on February 17, 1921. He had become particularly skilled in navigation and shipping matters, and because of this knowledge he left the coast guard and entered the merchant marine in the army transport service on the 9th day of January, 1943, and was continuously employed therein until the 29th day of March, 1946, when he received a certificate, pursuant to Public Law 87 of the Seventy-eighth Congress (57 Stat. 162), showing his service in the merchant marine and entitling him to reemployment rights as a person who had honorably and capably served the merchant marine. That while the petitioner was serving in the merchant marine and because he had disenrolled from the coast guard and gone into the merchant marine, he was accused of neglect of duty with the Los Angeles Police Department. A hearing was held in his absence because of his service in the merchant marine and he was removed from his position in the Los Angeles Police Department, which removal deprived him of his office and all of the emoluments of his office, including compensation and including the right to have his name posted as a person who had honorably served the United States Government during the war; that the petitioner reported from various ports to which he navigated ships, to Captain Joseph F. Reed and Captain

Harrison of the Personnel Department of the Los Angeles police department, stating that he was on the S.S. Eugene Skinner, operating in the South Pacific, Indian Ocean, and the South China Sea; that after he had so operated he returned to Los Angeles and reported to the Police department for duty and was informed that he had been removed and discharged; that the Court sustained a demurrer without leave to amend in the Superior Court. On appeal from this judgment, the actions of the City of Los Angeles were again challenged as in violation of the rights guaranteed by the statutes of Congress and the clear policy enunciated by Congress. The District Court of Appeal affirmed and found against petitioner, and found that the Federal statutes did not protect petitioner. The Supreme Court of California denied a hearing, two justices dissenting.

In each instance there was a challenge under the Federal laws. The challenge in the Superior Court is found on pages 6 and 7 of the record. The challenge in the District Court of Appeals is discussed in the opinion of the District Court of Appeal denying the challenge, page 10 of the opinion, printed as a supplement to the petition for hearing in the Supreme Court.

Statutes and Decisions Believed to Sustain Jurisdiction

Title 28, sec. 344, (a) and (b), U. S. C.
Title 50, secs. 1471 to 1474, U. S. C. A.
Title 46, U. S. C. A. sec. 1101.
Miller v. *Superior Court,* 22 Cal. (2d) 818;
Stromberg v. *California,* 283 U. S. 359, 75 L. Ed. 1117.

The declared policy of the United States is binding upon the State of California.

Testa v. *Katt,* No. 431, October 1946 Term, decided March 10, 1947, 91 L. Ed. 776;
Mandou v. *New York, etc.,* 223 U. S. 1, 56 L. Ed. 327.

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In *Testa* v. *Klatt* the U. S. Supreme Court quoted with approval from the *Mondou* case as follows:

> "When Congress, in the exercise of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and hereby adopted a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791;
Smith v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859;
Adamson v. *People*, 91 L. Ed. (Vol. 17, Adv. Opinions, 1464);
Avery v. *Alabama*, 308 U. S. 444, 84 L. Ed. 377;
White v. *Regan*, 324 U. S. 760, 89 L. Ed. 1348;
Resweber v. *Louisiana*, 329 U. S. 459, 91 L. Ed. 359.

Specification of Errors upon Which Appellant Intends to Rely

(1) The City of Los Angeles in construing sections 17, 125 and 202 of its charter, and the State of California, in construing the laws of the city of Los Angeles and applying them, are bound by the national policy of Congress, expressed in its Act of June 23, 1943, C. 142, sec. 2, 57 Stat. 162, Title 50, U. S. C., sections 1471, 1472 and 1474; amendment of August 8, 1946, C. 867, 60 Stat. 906, and all Congressional intent and purposes in respect to those Acts.

(2) The construction and application of the Act to a member of the Los Angeles Police Department, who served 19 years in that department, and the holding of the city and state that that officer was guilty of neglect of duty because he joined the merchant marine and served with it during the hazardous period of the war, instead of return-

ing to the Los Angeles Police Department, are contrary to the national policies expressed in the Act of Congress, inherently and as construed and applied in this case.

(3) A city in its charter and a state in its construction of said city charter are bound by the national policy.

(4) The District Court of Appeal of the State of California, Second Appellate District, which was the highest court to which said case could go, erred in its construction and application of the Act of June 23, 1943, Chapter 142, section 2, 57 Stat. 162, Title 50 U. S. C. A., sections 1471, 1472, and 1474, and the amendment of August 8, 1946, Chapter 867, 60 Stat. 906.

(5) The District Court of Appeal of the State of California erred in its application and construction of the Merchant Marine Act of 1936, Title 46, Chapter 27, section 1101, U. S. C. A., and in holding that said section is not binding on the State of California, and the City of Los Angeles.

(6) The petitioner was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, when the city Board of Rights and the Chief of Police discharged him for neglect of duty for joining the merchant marine without reporting back to the City Police Department, and the District Court of Appeals, inherently and as construed and applied in this case, erred in holding that the Chief of Police and the Board of Rights accorded petitioner due process of law when they discharged him because of joining and remaining in the merchant marine in time of war.

Importance of the Question Raised

The question is new and important, and will affect a large number of persons who served in the merchant marine during the war after they had served in the armed forces,

and who left the armed forces to go into the merchant marine because of their experiences at sea, as shown in the instant case and as expressed in the Congressional debates.

A hearing should, therefore, be had to determine the national policy in its application to the City of Los Angeles.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner and Appellant.

EXHIBIT "A"

Opinion of the District Court of Appeal

[Title of Cause.]

Filed Oct. 17, 1947

Appeal from the Superior Court of Los Angeles County, Honorable Henry M. Willis, Judge.

For Appellant: Morris Lavine.
For Respondents: Ray L. Chesebro, City Attorney; Bourke Jones, Assistant City Attorney, and George William Adams, John F. Feldmeier, Deputies.

Appeal from a judgment of dismissal pursuant to a favorable ruling on a general demurrer to appellant's petition for a writ of mandamus to compel respondents to restore to him his position as a member of the police force of Los Angeles.

CONTENTS OF APPELLANT'S PLEADING

The pleading alleges that petitioner has been an officer of the police force of which he became a member on April 1, 1925; that he was continuously such officer until September 6, 1942, when he was granted military leave to enlist in the United States Coast Guard. The City's charter provides for a police department for the purpose of enforcing its police, safety, and other regulations not in conflict with the general laws. By section 17 of such basic law every officer called into active service in the "armed forces" of the United States during time of war "shall during the period of such service, and for a period of ninety days from and after his discharge or release from such service, be considered as being on leave of absence." Such leave shall be designated military leave, but its benefits shall not inure to any person who may be dishonorably discharged from the service to which he was called. "Every such officer or employee returning to the service of the city from military leave within the time hereinabove designated shall be re-

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stored to the same rank and position held by him at the time of the commencement of his military leave, or to such other rank and position to which he would be . . . entitled under the provisions of section 125 of this charter * . . . it being the intent of this provision to provide for the reemployment of persons absent on account of military leave without prejudice on account of their absence . . . during the period of such leave."

Appropriate allegations declare the existence of war between the United States and Japan, the President's declaration of the national emergency, its present existence and Japan's surrender, and the necessity for the government to transport food, clothing, medicine, arms, ammunition, all war material and soldiers from the Pacific Coast and other places to points at which they were required. To accomplish such ends the merchant marine enrolled such available men as had enjoyed experience in shipping, of whom appellant was one, having served in the Navy for three years. Such experience rendered his services desirable in the merchant marine whereby he could better promote peace and safety for the citizens of the United States and the City of Los Angeles than by his service in any other capacity.

Petitioner was disenrolled from the Coast Guard on December 9, 1942, and enrolled in the merchant marine with which he was continuously employed until March 29, 1946. Upon his release he received from the administrator of the War Shipping Administration a certificate pursuant to Public Law 87 that he had completed a period of substantially continuous service in the merchant marine since January 9, 1943. It certified that petitioner is eligible to be relieved from any further consideration for classification under the Selective Service System.

While petitioner was serving in the merchant marine, August 3, 1943, defendant Chief of Police, C. B. Horrall, accused petitioner of neglect of duty in that having been

* This section provides for the manner and order in which persons shall be suspended and restored by the Board of Civil Service Commissioners. Suspension for personal delinquency and restoration "shall be based upon seniority as hereinafter provided."

granted military leave to enter the Coast Guard Reserve and having been disenrolled therefrom December 9, 1942, he failed to return to active duty within the statutory limit of 90 days; that "no copy of the accusation had been served personally and he had no knowledge of the hearing and was not represented." The defendants Eaton, Clark and Collins, acting as a Board of Rights, found petitioner guilty of the charges and recommended his removal from the department without prejudice. Therefrom the Chief discharged appellant.

On February 7, 1946, and while petitioner was still serving in the merchant marine, he applied for a rehearing. His application was granted by the Chief; a new Board of Rights was appointed, consisting of defendants Lawrence, Mesloh and Steed. At a hearing on February 27, 1946, petitioner personally appeared, represented by counsel. All witnesses called by both parties gave their testimony. In addition to the facts recited the petition recites in detail petitioner's testimony of his service rendered on the two armed transports, the "Eugene Skinner" and the "Ball's Bluff"; of his transfer to the latter which operated in the south seas and Indian Ocean from December, 1944, to January, 1946; and of his entry into different ports where he reported to the Navy, and his report to the police department immediately upon leaving the last named vessel. Defendant Reed, assistant chief of police, testified before the Board that he had received a letter from petitioner in 1943 stating that he had been detained and that he would be unable to return, and requesting that the personnel bureau be informed. The testimony of Reed was in no respect contradicted except by Paul E. Harrison, a personnel officer, who denied having received any communication from petitioner after he was disenrolled from the Coast Guard, but stated that petitioner's wife telephoned the bureau after a letter had been sent advising petitioner of their information, and that he had advised her that although appellant had been disenrolled over 90 days, he might still return to his office. Harrison testified also that the police department had very few men with licenses from the maritime commission as qualified officers. Petitioner testified without contradiction that at all times within the 90-day period after December 9,

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1942, he was unable to return to Los Angeles by reason of his duties and lack of transportation.

The board having found appellant guilty of neglect of duty, defendant Reed served upon him a notice of his removal from the police force. There was no evidence of neglect of duty other than his failure to return within 90 days after his disenrollment from the Coast Guard.

Vice of the Pleading

Respondents maintain that since appellant had no statutory right to a leave of absence the judgment of the Board of Rights and the action of the Chief of Police cannot be judicially reviewed, the complaint having alleged no abuse of discretion. In support of such contention it is suggested that section 202 of the charter confers upon the Board the power to hear and determine a question of fact and that such power and the Board's decision cannot be controlled by the courts. It is a rule of wide acceptance that the writ of mandamus may not be employed to effect a desired decision contrary to the opinion of an official or a board vested with discretionary power. (Bank of Italy *v.* Johnson, 200 Cal. 1, 31.) Since the charter confers discretionary power on the Board of Rights to determine whether a police officer has been guilty of neglect of duty, a complaint which alleges that such Board heard the evidence offered by appellant and derived its decision therefrom does not state a cause of action for a writ to compel respondents to reverse their decision and to restore appellant to his position. (Diersen *v.* Civil Service Commission, 43 Cal. App. 2d 53, 59.)

Appellant by his petition asks the court to substitute its judgment for that of the Board of Rights which was by the charter given jurisdiction to determine whether a police officer has been guilty of neglect of duty. (Charter of Los Angeles, sec. 202.) Clearly this cannot be done in the absence of a showing of abuse of discretion by the administrative board. (Shewbridge *v.* Police Commission, 64 Cal. 2d 787, 793.) Such showing is absent from the petition at bar. It discloses that appellant was granted military leave to enlist in the Coast Guard, a division of the armed forces,

and that although he disenrolled therefrom in December, 1942, he did not present himself within 90 days from his release for restoration to police duty, but delayed doing so until January, 1946; that during the interim he was not with the armed forces but was a member of the merchant marine. In view of the alleged failure of appellant to return to his post within the time prescribed, of the language of section 17 of the charter and of Public Law 87, it cannot with accuracy be said that the Board abused its discretion.

The charter section merely allows a police officer to enter active service in the armed forces during war time without detriment to his rank and seniority provided that upon application within 90 days after his discharge he shall be restored to his position. Unless it can be said that his enrollment in the merchant marine and his service there was a compliance with section 17 and was as a matter of law the same as serving with the armed forces, the Board of Rights did not abuse its discretion in finding appellant guilty of neglect of duty in failing to return to his position within ninety days.

Public Law 87 (50 U.S.C.A. sec 1472, Appendix) was not violated by the Board. That statute was enacted in June, 1943, for the purpose of making service in the merchant marine more attractive. Section 1472 designates three classes of persons to be affected, viz, those in (a) federal employment, (b) private employment, (c) state employment. The Act distinctly provides that those who shall have left the employment of the federal government or of a private employer to serve in the merchant marine shall be restored to their positions of like seniority, status and pay. But no such provision was made for those who left the sevice of a state or of a political subdivision thereof. As to them it merely "declared it to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status and pay." To emphasize its meaning subsection (b) provides that an employee of the federal government or of a private employer shall be considered as having been on furlough during his period of service in the merchant marine, but it does not make a similar requirement, as indeed it could not, for employees of a state or of its political subdivisions. In

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order to make such act binding upon the City of Los Angeles the adoption of an appropriate statute by the California legislature was essential for the reason that the public policy of a state with respect to any matter can be expressed only by an act of its own lawmaking body. (11 Am. Jur. 814; 5 Cal. Jur. 670, 711; In re Jones, 56 Cal. App. 2d 660, 665; Allen *v.* Lelande, 164 Cal. 56, 57; Twin City Pipe Line Company *v.* Harding Glass Company, 283 U. S. 353, 357; Baker *v.* United States, 27 Fed. 2d 863, 875.) It is true that on August 8, 1946, section 1472 was further liberalized by the Congress for the benefit of employees of the federal government and of private employers. However, no change was made for the benefit of those who had left state employment to serve in the merchant marine. (50 U.S.C.A., Appendix, p. 308.)

Moreover, appellant having by due process of law forfeited his right to be on the police force, the Chief of Police is without authority to restore him. In order for him to regain membership in that organization he must pursue the route followed by any citizen who seeks to become a police officer. Unless the charter provides for an exception to be made in the manner of employing one who has been discharged from his position in the city government the courts cannot supply such provision. (Cronin *v.* Civil Service Commission, 71 Cal. App. 633, 643) Courts may annul a statute which violates the fundamental law but they cannot declare as law that which they might conceive would be a wholesome statute. Neither can an executive officer of Los Angeles in disregard of its civil service laws either restore an employee or appoint him to the position from which he, for cause, has been discharged. Since the Board of Rights was vested with full power to determine the guilt of appellant and acted in conformance with a statutory procedure, the Superior Court had no power or authority to inquire whether the grounds upon which the discharge was based were well founded. Its power was confined to a determination of whether the Board acted within the prescribed rules or violated the constitution or general laws. (Nider *v.* City Commission of Fresno, 36 Cal. 2d 14, 23; State ex rel. Beebe *v.* City of Seattle, Wash., 293 Pac. 459, 460; State ex rel. Wolcott *v.* Boyington, Wash., 188 Pac. 777, 779.) Nor can

such power of that court be enlarged by its conclusion that the decision of the Board of Rights was incorrect. (Shewbridge *v.* Police Commission of the City and County of San Francisco, 64 Cal. App. 2d 787, 793.)

Conceding, arguendo, appellant's contention that the Superior Court had jurisdiction to order his restoration to the police force if the court should determine there was not sufficient cause for his removal, we are brought to a consideration of the act charged as constituting a neglect of duty. The allegation is that he obtained a military leave and used it to enroll in the Coast Guard; that after a brief service there he responded to what he deemed a call of his country to join the merchant marine, which was then in "urgent need" of men experienced in shipping, to the end that he might better promote peace than by any other service. But there is no allegation that he could not have returned to the police force within 90 days leaving the Coast Guard or that he applied for further leave in order to serve the merchant marine during the war. In disdain of the constituted authorities in December, 1942, he embarked upon the "Eugene Skinner" from which three months later he notified the police department of his occupation and location. By his wilful action he placed himself in a position from which he could not return within the 90 days. Such conduct on the part of individuals in a law enforcement organization consisting of thousands of men will render its cohesion impossible and its constant efficacy for maintaining order and enforcing the law impracticable. No person is above the law even though his violation thereof is prompted by a desire to serve the state at greater peril or more effectively than by a strict compliance, and notwithstanding that his act results in his rendering invaluable services. A police force constitutes the very first line of defense against insidious forces gnawing at the vitals of the republic and against the forces of terror and brigandage. Discipline within its ranks must be enforced and undivided allegiance to the public interest maintained even at the expense of freedom of action to service in a larger field. (See Doyle *v.* Kammerad, Mich. 17 N. W. 2d 165, 168, Coane *v.* Geary, Ill., 18 N. E. 2d 719, 722; Perez *v.* Board of Police

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Commissioners of the City of Los Angeles, 78 Cal. App.*)

Appellant emphasizes the language of the Merchant Marine Act of 1936. (U. S. C. A., Title 46, Chap. 27, Sec. 1101.) It is declared by the cited section that one of the reasons for fostering the merchant marine is that "it should be capable of serving as a naval and military auxiliary in time of war or national emergency." Such declaration of congressional sentiment is not binding upon the state of California as though it were the declaration of her public policy. The United States of America and the state of California are two separate sovereignties, each dominant within its own sphere. While this state gives its full support to the national government in the conduct of the war, it does not by virtue of that fact automatically adopt the public policy of the nation as its own. The above quoted language is a part of subchapter I of the Act which is entitled "Declaration of Policy." Section 1101 is such subchapter in its entirety. It contains no provision which makes the merchant marine a part of the military or naval forces but is confined to the declaration that "it is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine . . . capable of serving as a naval or military auxiliary in time of war . . ." Not only does the quoted section fail to make members of the merchant marine units of the armed forces, but no federal statute has been enacted to effect such purpose. Had it ever been the intention of Congress to confer upon the members of the merchant marine the same status as soldiers it is unlikely that it would have adopted section 1251 of the Act which "encouraged the practice and procedure of collective bargaining . . . concerning rates of pay . . . or working conditions." Neither soldiers nor seagoing sailors nor even naval gun-crews on merchant vessels were ever privileged to bargain collectively. They are an arm of the executive branch of the government and can make no demands upon the sovereignty. On the contrary, the merchant marine is a voluntary organization whose functions and services are exclusively civilian in nature and may be terminated at the

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* See 78 A.C.A. 688.

will of an enrollee. (In re Goodell, 57 N. Y. S. 2d 754.)* Some three years prior to the Goodell decision the Attorney General of New York in an opinion requested by the New York Tunnel Authority held that employees of the merchant marine not entitled to the benefits of that state's Military Law in the matter of leaves of absence to employees engaged in military duty. He stated that unless the merchant marine shall be made a part of the Navy or a naval auxiliary, or shall be otherwise organized as a public military force, public employees engaged in the merchant marine are not entitled to a statutory leave of absence from their public positions. (Opinions of Attorney General, New York, 1942, p. 395.)

The case of Rappaport *v.* Civil Service Commission, 134 Cal. App. 319, does not support appellant's contention that the accusation filed against him was insufficient. In that case an assistant physician was charged (1) with having accepted pay for his medical service and (2) neglect of duty in failing to visit two wards which had been assigned to him. Appellant emphasizes the court's language that "the mere failure to perform a certain act with nothing more does not constitute either a neglect of duty in fact or in law" (p. 323.) But since there were no rules governing the conduct of assistant physicians or forbidding them to accept compensation from an employee of the hospital no unlawful conduct was charged. There is no parallel in the cited case to that here under consideration. Appellant was accused of disregarding a specific charter inhibition and the charge was established.

The Board of Rights Had Jurisdiction

Appellant contends that the Board of Rights did not acquire jurisdiction to try and determine his case. This contention is based upon the fact that the notice of the filing of the accusation was mailed to his "last known address;" that "no showing was made to the Board that due diligence had been exercised to find him;" that "his removal was

* The decision discloses that the New York legislature in 1944 so amended its Military Law as expressly to include employees of the merchant marine, thereby conserving their civil service tenure.

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summarily ordered without giving him a hearing"; that "his right to the office was a property right not to be taken from its possessor except in such manner and for such reasons as would justify taking property." The answer to such contentions is readily found in the provisions of the charter and in court decisions.

Section 202 of the charter provides that the right of an officer of the city police department is a substantial property right; that he shall not be deprived of it arbitrarily; that he shall not be deprived of his office except for "good and sufficient cause shown upon a finding of *guilty* of the specific charge . . . assigned as cause . . . therefor after a full, fair, and impartial hearing before the Board of Rights." Subsection 4 of section 202 provides that "service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing the officer or employee a copy thereof personally or by forwarding such copy by registered mail to his last known address of record with the Police Department if after due diligence he cannot be found." Appellant's complaint that no showing was made to the Board of the exercise of due diligence to find him has a triple answer (1) He states in his brief that "it was known to the Chief of Police and to members of the trial board that he was outside of the United States and therefore that a communication mailed to his last known address could not and would not reach him." The petition alleges that the chief of police and the trial board knew that appellant was then in the employment of the merchant marine and was absent from the United States. Surely, appellant does not intend to imply that the Board of Rights, despite such knowledge, should before trying him on the accusation have required a search to be made throughout the city of Los Angeles! The law does not require the performance of an idle act. (2) But appellant deems himself to be aggrieved in that there was no need "for his removal while he was still out of the country." By such argument he indicates that he, rather than the chief of police or the Board of Rights, should determine whether he was neglecting his duty as a member of the police force by his serving in the merchant marine without express leave. No provision is to be found in the

charter authorizing a police officer to exercise his own judgment in the matter of absenting himself from the city or in accepting other employment. The chief of police is the delegated official to make such decision, with no limitations other than the decision of a Board of Rights to be made after a "full, fair and impartial hearing." (3) Upon his request a rehearing was granted and a complete hearing was accorded with his counsel present.

That the first hearing was fair and impartial is conclusively established by the pleaded facts (1) that the chief of police deferred filing the accusation for seven months and 24 days after appellant left the Coast Guard; (2) that credible witnesses testified to, and appellant makes no attempt to conceal, the date of his disenrollment from the Coast Guard, his employment by the merchant marine and his absence in the far reaches of the Pacific Ocean. (3) His second hearing was fair and impartial in that it was granted as a matter of grace and all evidence offered by appellant was admitted and considered.

That appellant's right to his position as a member of the police force was a "substantial property right of which he shall not be deprived arbitrarily or summarily," (Charter of Los Angeles, sec. 202) is not questioned. The answer to such claim is found in the fact that he was accused, notified and fairly tried in conformance with the charter provisions. Such procedure fulfills all the requirements of due process of law. (Wulzen *v.* Board of Supervisors, 101 Cal. 15, 20; Hurtado *v.* California, 110 U. S. 516.) It was not intended either by the citizens of Los Angeles or by the legislature that by the employment of a person as a member of the police force he thereby becomes "owner" of the office in the same sense that he owns his horse or his home. (See Boyd *v.* Pendegast, 57 Cal. App. 504, 506; 46 C. J. 932.) Not only may the law provide for the removal of an incumbent official but the latter's right to his office perishes with the order for his discharge when it results from an adherence to statutory procedure required for his dismissal for cause. (In re Carter, 141 Cal. 316, 319.) The philosophy underlying the theory of such property right is that the employee should have some reasonable permanency of tenure to the end that his mind be free from fear of losing his

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means of subsistence, enabling him to devote his life to the public service, and that in the enjoyment of such right the officer will be protected against summary removal. (People ex rel Schumann *v.* McCartney, 53 N. Y. Supp. 1047.) His protection against being arbitrarily removed from office is designed for the public good as well as for his own. The public is entitled to the increased efficiency which results from experience. No official or board may by summary order divest a city employee of his career office. (Garvin *v.* Chambers, 195 Cal. 212, 225; Schumann *v.* McCartney, *supra.*) Only after a judgment convicting him of neglect of duty by a board may the head of the department discharge him.

While a police officer's right to his position will be protected by due process of law "in the broadest sense of the term" (Ekern *v.* McGovern, 154 Wis. 157), he may not during his tenure, in disregard of express regulations, wrap his title to the office in the silken folds of his dreams and embark upon free adventure.

The judgment is affirmed.

MOORE, P. J.

We concur. McComb, J. Wilson, J.

EXHIBIT "B"

Title 50 U. S. C. A. § 1471: Service in the merchant marine; definition; persons entitled to certificate of service.

(a) When used in this Act (sections 1471-1475 of this Appendix) the term "service in the merchant marine" means service as an officer or member of the crew on or in connection with a vessel documented under the laws of the United States or a vessel owned by, chartered to, or operated by or for the account or use of the Administrator, as an enrollee in the United States Maritime Service on active duty, and, to such extent as the Administrator shall prescribe, any period awaiting assignment to such service and any period of education or training for such service in any school or institution under the jurisdiction of the Administrator or any civilian marine school under the jurisdiction of the Army Transportation Corps.

(b) Any person entering service in the merchant marine after May 1, 1940, and before the termination of the unlimited national emergency declared by the President on May 27, 1941, who, in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration, completes a period of substantially continuous service in the merchant marine, shall be entitled to a certificate to that effect from the Administrator upon completion of such period, which shall include a record of any special proficiency or merit obtained. As amended Aug. 8, 1946, c. 867, 60 Stat. 905; Aug. 8, 1946, c. 912, 60 Stat. 945.

Title 50, App. §1472: Restoration to civilian employment; service both in merchant marine and in land or Naval forces; terms and conditions

(a) In the case of any such person who, in order to perform service in the merchant marine, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after completion of such service, and, in the case of that

person described in subsection (b) of this section who fulfills the requirements of clauses (1) and (2) of this subsection and in the case of that person described in subsection (c) of this section who fulfills the requirements of clauses (1) and (2) of section 8 (b) of the Selective Training and Service Act of 1940, as amended (section 308 of this Appendix), and makes application for reemployment within ninety days after completion of service in the merchant marine or relief from training and service in the land or naval forces, or, in the case of any person described in this section, within ninety days from hospitalization continuing after such completion or such relief for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay, without regard to whether such position shall have been covered into the classified civil service during the period of his military, naval or merchant marine service;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(b) Any person who, after May 1, 1940, and before the termination of the unlimited national emergency declared by the President on May 27, 1941, shall have entered upon active military or naval service in the land or naval forces of the United States, and who shall thereafter, within the aforesaid period, have been discharged or released from active service and have received a certificate evidencing satisfactory completion of such active service, and who shall, within thirty days from date of discharge or release

from active service, have entered upon service in the merchant marine, shall be entitled to all the reemployment benefits of this Act, as amended (sections 1471-1475 of this Appendix), to the same extent as in the case of any person who, in order to perform service in the merchant marine, has left or leaves a position, other than a temporary position, in the employ of any employer, in lieu of the reemployment benefits of the Selective Training and Service Act of 1940, as amended (sections 301-318 of the Appendix), and of the Service Extension Act of 1941, as amended (sections 351-362 of this Appendix).

(c) Any person who, after May 1, 1940, and before the termination of the unlimited national emergency declared by the President on May 27, 1941, shall have entered upon service in the merchant marine, and who shall thereafter within the aforesaid period have terminated such service in the merchant marine solely in order to perform active military or naval service in the land or naval forces of the United States, and who shall, within thirty days from date of termination of his service in the merchant marine, have entered upon such active military or naval service, and who shall thereafter have received a partial certificate of substantially continuous service, shall be entitled to all the reemployment benefits of the Selective Training and Service Act of 1940, as amended (sections 301-318 of this Appendix), and of the Service Extension Act of 1941, as amended (sections 351-362 of this Appendix), to the same extent as in the case of any person who, in order to perform active military or naval service in the land or naval forces of the United States, has left or leaves a position other than a temporary position, in the employ of any employer, in lieu of the reemployment benefits of this Act, as amended (sections 1471-1475 of this Appendix).

(d) Any person who is restored to a position in accordance with the provision of paragraph (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during his period of service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and prac-

tices relating to employees on furlough or leave of absence in effect with the employer at the time such person entered such service, and shall not be discharged from such position without reasonable cause within one year after such restoration. As amended Aug. 8, 1946, c. 867, 60 Stat. 906.

Title 50, App. §1474. Additional compensation to certain civilian employees during period of merchant marine service

Employees of the United States Government, its Territories or possessions, or the District of Columbia (including employers of any corporation created under authority of an Act of Congress which is either wholly controlled or wholly owned by the United States Government, or any corporation, all of the stock of which is owned or controlled by the United States Government, or any department, agency, or establishment thereof, whether or not the employees thereof are paid from funds appropriated by Congress), who, subsequent to May 1, 1940, shall have entered upon service in the merchant marine, shall be entitled to receive, in addition to any pay for such service, compensation in their civilian positions covering their accumulated or current accrued leave, or to elect to have such leave remain to their credit until their return from such service. As amended Aug. 8, 1946, c. 867, 60 Stat. 907.

EXHIBIT "C"

Charter of the City of Los Angeles, Article II, Section 17:

"Sec. 17. Notwithstanding any other provision of this charter, every officer or employee called into active service in the armed forces of this state or of the United States, during time of war or for ordinary periods of training or for extended periods of training during the time of any limited or other national emergency as declared by the President or the Congress of the United States or the Governor of the State of California, shall, during the period of such service, but not exceeding five years of such service,

and for a period of ninety (90) days from and after his discharge or release from such service, be considered as being on leave of absence from the service of the City of Los Angeles, provided that no such leave of absence shall be allowed in the case of any person who is dishonorably discharged from the service to which he was called. Such leave shall be designated as "military leave" and shall be so noted on all records of the employment of said officer or employee. Every such officer or employee returning to the service of the city from military leave within the time hereinabove designated shall be restored to the same rank and position held by him at the time of the commencement of his military leave, or to such other rank and position to which he would be or would have been entitled under the provisions of Section 125 of this charter in the event any change in personnel within the contemplation of said charter section has occurred during the period of his military leave, it being the intent of this provision to provide for the reemployment of persons absent on account of military leave, without prejudice on account of their absence from the city service during the period of such leave; provided, nevertheless, that any such person is not, upon such return, either physically or mentally incapacitated from performing the duties of the office or position to which he is entitled to be restored. All military leave herein provided for shall be without pay or compensation except to the extent that such pay or compensation is now or may hereafter be authorized and provided for by state law, this charter, or by ordinance.

In addition to credit for time served in the United States Army, Navy, Marine Corps, and any division thereof in time of war as allowed under the existing provisions of Sec. 189 and subdivision (d) of Sec. 513, credit shall be given for periods of military leave as provided in this section to the same extent and with like force and effect as now allowed for war service under the charter sections hereinabove mentioned. (New Section, 1941.)"

Section 202, Charter of the City of Los Angeles:

Sec. 202. (1) The right of an officer or employee of the Police Department to hold his office or position and to the

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compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of "guilty" of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights (except as otherwise specifically provided in paragraphs (2) and seven (7) of this section). Such charges must be based upon some act committed or omitted by such officer or employee within one (1) year prior to the filing of the complaint referred to herein. No case of suspension with loss of pay shall be for a period exceeding six (6) months.

(2) Provided, however, that the Chief of Police may:

(a) Temporarily relieve from duty any officer or employee of the Police Department pending a hearing before and decision by the Board of Rights of any charge or charges pending against such officer or employee; or he may

(b) Suspend such officer or employee for a total period not to exceed thirty (30) days with loss of pay and with or without reprimand, subject, however, to the right of such officer or employee to a hearing before a Board of Rights. In the event the officer or employee suspended under this subparagraph files his application with the Chief of Police (within five (5) days after service upon him of notice of such suspension if he has been personally served or within ten (10) days if he has been served in any other manner as herein prescribed), for a hearing before and decision by a Board of Rights in the manner in this section provided, such suspension shall thereupon automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. In the event, however, that such officer or employee so suspended under subparagraph (b) of paragraph two (2) hereof, fails to so apply for such hearing within the period prescribed, he shall be

deemed to have waived such hearing and such suspension shall remain effective, unless the Chief of Police require that a hearing be had, as hereinafter provided.

(3) In the event any order of relief from duty or order of suspension is made under either subparagraphs (a) or (b) of paragraph two (2), such order must contain a statement of the charges assigned as causes therefor, and the Chief of Police must (within five (5) days after such order of relief from duty or order of suspension is served as in this section prescribed) file with the Board of Police Commissioners a copy of a verified written complaint upon which such order of relief from duty or order of suspension is based, with a statement that a copy of such order of relief from duty or order of suspension and copy of verified complaint was served upon the accused. Such complaint must contain a statement in clear and concise language of all the facts constituting the charge made. In the event that the Chief of Police fails to file the aforesaid statement and complaint within the five (5) day period heretofore prescribed, the aforesaid order of temporary relief from duty or order of suspension shall thereupon become void and of no effect and shall be automatically revoked, and the accused officer or employee restored to duty with the department without loss of pay and without prejudice, the same as if no order of relief from duty or order of suspension had been made.

(4) The service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing the officer or employee a copy thereof personally or by forwarding such copy by registered mail to his last known address of record with the Police Department if after due diligence he cannot be found.

(5) Within five days after service upon him of copy of the aforesaid verified complaint if he has been personally served in any other manner as herein prescribed, the accused officer or employee may file with the Chief of Police his written application for a hearing before and decision by a Board of Rights.

(6) The Board of Rights shall be constituted of three (3) officers of the rank of captain or higher. Upon the filing of

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the request for hearing before a Board of Rights as hereinabove provided, the officer or employee shall draw six (6) cards from a box containing the names of all of the officers who are qualified to sit upon such board (except the names of the accused, the accuser, the Chief of Police and the Assistant Chief of Police, and such other officer as may be otherwise prejudiced or otherwise disqualified by reason of being a material witness to the facts constituting the charges made), and shall select any three (3) of the six (6) names thus drawn to constitute the Board of Rights to hear and decide upon the charges against him, rejecting the three (3) not selected by replacing them in the box. The three (3) thus selected shall constitute the Board of Rights to hear and decide the matter.

(7) In the event the accused fails, in any case, to request a hearing before a Board of Rights as hereinabove provided within the period prescribed, the Chief of Police may require a hearing to be had before a Board of Rights and may for that purpose, within five (5) days, after the expiration of such period, draw three (3) names from such box to constitute such board. Provided, however, that in any case where such Board of Rights has been constituted for the purpose of hearing as herein in this section provided and the accused, without reasonable excuse, fails, neglects or refuses to appear before the said Board of Rights in session for such trial or hearing at the time and place designated, the Chief of Police may, at his discretion, either direct the Board of Rights to proceed with such trial or hearing in the absence of such accused, or he may, without such hearing, impose such penalty of suspension or removal as he deems fit and proper, and cause notice thereof to be served upon such officer or employee so suspended or removed in the manner herein prescribed, and file a statement of such action with the Board of Police Commissioners within five (5) days thereafter; and, provided further, however, that in the event the accused and Chief of Police both fail to draw and create such Board of Rights within the period prescribed in any case of temporary relief from duty pending hearing, then and in that event such temporary relief from duty shall be null and void and of no effect the same as if it had not been made.

(8) Upon the selection of the officers to constitute the Board of Rights, the said Chief of Police shall appoint the time (not less than five (5) nor more than ten (10) days thereafter) and designate a place where such hearing is to be held, and shall cause notice thereof to be served upon accused in the manner herein prescribed.

The Board of Rights may at any stage of the proceedings (after it has first met in session at the time and place designated) continue from time to time the hearing of the matter pending before them.

(9) The officers so selected as herein prescribed shall constitute the Board of Rights (for the purpose of hearing and deciding upon the matter for which it was specially drawn) and shall have the power to administer oaths and affirmations in any investigation or proceeding pending before said board, examine witnesses under oath, and compel the attendance of witnesses and production of evidence before them, respectively, as the case may be, by subpoena to be issued in the name of the City of Los Angeles, and to be attested by the City Clerk of said city.

(10) The City Clerk shall, upon demand of the officers constituting the said Board of Rights, issue such subpoena in the name of the city, and attest the same with the corporate seal thereof, and shall in such subpoena direct and require the attendance of the witnesses sought to be subpoenaed before the said board, at the time and place in said subpoena specified; and it shall be the duty of the Chief of Police to cause all such subpoenas to be served by some member of the Police Department upon the person or persons required to attend as aforesaid; and it shall be the duty of the Council upon the adoption of this charter amendment to provide suitable penalties for disobedience of such subpoenas, and the refusal of witnesses to testify as herein provided.

(11) The City Attorney (or some duly authorized deputy) shall, upon request of the Board of Rights, sit with said Board of Rights during its session or hearing for the purpose of advising the said board on any and all legal matters pertaining to this section.

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(12) At such hearing the accused shall have the right to appear in person and by counsel or representative, or both, and make defense to such charge and may produce witnesses to testify in his behalf and cross-examine witnesses against him. The accused shall have the right and privilege to select and name any officer of the department of any rank not higher than the rank of Lieutenant (who is not otherwise disqualified by reason of prejudice or being a party to the action in any capacity) to act as his defense representative at such hearing. The Chief of Police must immediately assign the officer so selected and named to act as such representative, and it is hereby made the duty of such officer to use every legal means available and exercise the best efforts of which he is capable to defend the accused at such hearing. All testimony at such hearing shall be given under oath, reported by a stenographer and transcribed and the accused shall be entitled to a certified copy of such transcript without charge or payment of fee. The said Board of Rights shall, at the conclusion of the hearing, make its specific findings of "guilty" or "not guilty" (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise and render and certify its decision in writing. If the accused is found "not guilty", said board shall order his restoration to duty without loss of pay and without prejudice, and such order shall be self-executing and immediately effective. In case, however, that the accused is found "guilty", the said Board of Rights shall prescribe its penalty (by order in writing) of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position; which decision and order must be certified in writing and a copy thereof immediately delivered to the Chief of Police. The departmental personal history and records of the accused shall not be available to the Board of Rights except and only in such cases where the accused has been found guilty of any charge upon which he was heard or tried by the Board of Rights, then only for the purpose of determining a proper penalty to be prescribed; provided, however, that in prescribing such penalty the said board must look to the nature and gravity

of the offense of which the accused has been found guilty and may at its discretion review the departmental personal history and record of such accused; provided further, however, that no item or entry in such record may be considered by the said board except in the presence of the accused, nor unless such accused has been given a fair and reasonable opportunity to explain any such item or entry.

(13) The Chief of Police shall thereafter execute the order of the Board of Rights within five (5) days after delivery to him of such certified copy of decision and order, or, he may within five (5) days at his discretion and in lieu of such order, impose a penalty upon such officer or employee less in severity than that ordered by the Board of Rights, but may not impose a greater penalty. In the case of a suspension or removal, the Chief of Police shall cause a copy of his notice of suspension or removal (based upon the order of the Board of Rights or upon his modification thereof) to be served upon such officer or employee and shall file a statement of such action with the Board of Police Commissioners within five (5) days thereafter.

(14) In any case of penal suspension or removal prescribed by the Board of Rights (or by the Chief of Police in case no hearing is had before a Board of Rights) the time of such suspension shall be computed from the first day such officer or employee was so suspended or relieved from duty pending hearing before and decision by the Board of Rights, and such removal shall relate back to and be effective as of the date of such relief from duty pending hearing before and decision by the Board of Rights.

(15) No officer or employee of the Police Department shall be twice tried for the same offense, except upon his request. In any case of exoneration of the accused after a hearing before the Board of Rights, such exoneration shall be without prejudice to such officer or employee.

(16) At any time within three (3) years after any case of removal as hereinabove provided, the officer or employee so removed may file his request with the Chief of Police to be reheard or to be heard on the cause of his removal, together with his supporting affidavit specifically setting forth

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in clear and concise language the reasons or grounds therefor. The Chief of Police must consider and decide upon such request and affidavit within thirty (30) days after such filing. If good reason or cause appears therefor, the Chief of Police must, without unnecessary delay, cause a Board of Rights to be constituted in the manner hereinabove provided for the purpose of hearing and deciding upon the matter. The said Board of Rights shall proceed as hereinabove prescribed, and shall at the conclusion of the hearing render and certify its findings (independent of any previous findings by any other Board of Rights, or any other court, board or other tribunal, or any investigation or report of or discretion exercised by the Chief of Police in such cases where no hearing was had before a Board of Rights), based upon the evidence adduced before it at such hearing and not otherwise, and shall make and certify its decision and order in writing, and shall deliver a copy thereof to the Chief of Police. The Chief of Police shall thereupon proceed in the same manner as is hereinabove provided for after decision by the Board of Rights.

(17) If, as and when the Board of Police Commissioners herein referred to should become abolished, then, and in that event, wherever in this section the Board of Police Commissioners is named or referred to there shall be read into this section in place thereof, the name of the officer, board or other body created in its place to assume the functions, powers and duties of such Board of Police Commissioners; or, in the absence of such specific provision, then there shall be read into this section the name of the officer, board or body to whom such powers or duties may be delegated, or who shall assume such powers or duties.

(18) This section shall not be construed to in any way affect any other rights any officer or employee may have to pursue or assert any and all other legal rights or remedies in relation to his office or position or to the compensations attached thereto, or to appeal to or be heard or tried by or before any court or other tribunal of competent jurisdiction, whether such court or other tribunal now exists or may be hereafter created or established.

(19) Any person restored to duty or reinstated in his office or position after suspension or removal, as provided in and under any provision of this section, shall be entitled to receive full compensation from the city the same as if such suspension or removal had not been made, provided that such compensation shall not be for more than six (6) months' salary. (Amendment 1935.)

Section 125—Charter of the City of Los Angeles:

"Sec. 125. In addition to all other matters, the board shall by its rules provide for:

(a) The manner and order, not inconsistent with the provisions hereof, in which persons shall be suspended and restored where such suspension results from lack of work, lack of funds or abolishment of position or otherwise, excepting suspension for personal delinquency, and in all cases such suspension and restoration shall be based upon seniority as hereinafter provided, or where not so provided, as provided by the rules of the board.

No assignment of employees to positions within a class, except as hereinafter in this section provided, for which no different examination requirements have been established by the board shall affect the requirements of this section governing suspension and restoration for lack of work, lack of funds or abolishment of position or otherwise, but, in all such cases, all employees within the same class-group, as hereinafter defined, and for which similar examinations are required by the board shall be considered as one class-group for such purposes.

(1) Whenever suspension other than for personal delinquency is to be made in any class in an office, department or bureau of the city, or major division established in and by a department having control of definite revenues and funds (and hereinafter referred to as a class-group), the person to be suspended shall be selected in the order determined by his length of service in such class since original regular appointment to such class in the classified civil service, after deducting periods of absence from such service as provided by the rules of the board. The person having the

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shortest length of service in such class shall be suspended first; and any person so suspended shall be entitled to displace the person holding a position in a class-group in which a regular position was formerly held by the person so suspended, who has a shorter length of service in such class-group and in classes of higher rank after deducting periods of absence from the city service since original regular appointment in such class as provided by the rules of the board.

The class-group in which suspension is to be made or the class-group in which restoration is to be made, shall include all positions created from such class-group subsequent to the original regular appointment therein of the person so suspended or restored. The determination of the Board of Civil Service Commissioners as to the class-group from which such positions were subsequently created shall be final and conclusive.

(2) The above provisions set forth under subdivision (1) shall govern in all cases unless modified in the following manner:

Upon the written request of the head of any office, department or bureau authorized in this charter, the Board of Civil Service Commissioners shall determine and establish lines of promotion and from time to time, as required, reestablish lines of promotion in such office, department, bureau or in a major division of a department controlling its own funds, as hereinafter in this section provided for, which shall be final and conclusive.

The term "line of promotion" as above used shall mean a series of classes within an office, department, bureau, or major division so arranged and so related to each other as to duties and responsibilities as to constitute logical promotional steps from a position in the class of lowest rank to a position in the class of highest rank in such series.

Upon the establishment of such lines of promotion in any office, department, bureau or major division as above provided, but not otherwise, the rule in such office, department, bureau, or major division shall thereafter be that in all cases of suspension for lack of funds, lack of work or abolishment of position or otherwise, excepting suspension for

personal delinquency, the person first suspended shall be the one in such class-group having the least seniority in that and all higher classes in the line of promotion in said office, department, bureau or major division in the classified civil service since original regular appointment therein, after deducting periods of absence from such service as provided by the rules of the board, and the person so suspended shall be entitled to a position in the class highest in rank in his line of promotion below that from which he was suspended and in which there is then employed a person whose seniority is less in that and higher classes, as above provided, than the person suspended; and the person so suspended shall displace the person in such lower class with the least seniority in that and higher classes in the line of promotion, as above provided; and each person in turn who is displaced by one having greater seniority shall be entitled to the same rights over other persons in the same line of promotion having less seniority in that and all higher classes, as above provided. In case two or more persons have the same seniority credit, the Board of Civil Service Commissioners shall by its rules provide a method by which to determine the order in which said person shall be suspended, which determination shall be final and conclusive.

(b) The establishment in each class in each office, department or bureau of the city or major division established in and by a department having control of definite revenues and funds of a reserve list which shall consist of the names of those persons who have been theretofore regularly appointed to, and have served beyond the probationary period in or have been regularly promoted to a position in such class and have been suspended from their positions since January 1, 1928, for causes other than personal delinquency, whether for lack of funds, lack of work, abolishment of position or otherwise; provided, that any person in the classified civil service who has served therein since January 1, 1928, and was suspended for causes other than for personal delinquency shall be entitled upon his written request therefor to have his name placed upon the reserve list in each such class-group in which he was regularly appointed and served beyond the period of probation and

from which class he was suspended prior to January 1, 1928. Each person whose name appears on the reserve list, until regularly restored to a position in his class in the office, department, bureau or major division from which he was suspended as hereinbefore provided for in this section, shall be certified for appointment, as in this section provided for, to a position in his class in the office, department, bureau or major division from which he was suspended; provided, that after this section takes effect, the name of any person, except as in this section provided for, who has been out of the service of the city for more than five years shall be permanently stricken from the reserve list by the board.

During suspensions other than for personal delinquency, the name of the person so suspended shall be placed and retained on the reserve list, as in this section provided for, in each class in each office, department, bureau or major division in which such person has served beyond the period of probation and from which he has been suspended for any cause other than personal delinquency.

Whenever any vacancy is to be filled, it shall be filled in the following order: First, by certifying from such reserve list, if any, in the class and office, department, bureau or major division in which such vacancy exists, the name of the person with greatest length of previous service in such class and all classes of higher rank as hereinbefore provided, or by transfer of a person whose service in such class and classes of higher rank is greater than that of any person on the reserve list of the office, department, bureau or major division where such vacancy is to be filled; secondly, by certifying from the promotional list, if any, as provided for in section 107 of this article, of the office, department, bureau or major division where such vacancy is to be filled; thirdly, by certifying from the reserve list of other offices, departments, bureaus and major divisions as shall be provided for by the rules of the board; fourthly, by certifying from the appropriate register of eligibles as elsewhere provided for in this article.

The board shall have the same power and duty to review as to regularity of procedure all cases of suspension for lack of work, lack of funds or abolishment of position or other-

wise, as elsewhere provided in the charter for removal, discharge, or suspension for cause; but the question of the necessity for such suspension for lack of work, lack of funds or abolishment of position shall not be subject to such review.

Except as hereinafter in this section provided, section 115 of this charter shall be deemed superseded hereby.

The provisions of this section shall not apply to the Department of Fire or the Department of Police. (New section, 1933)."

EXHIBIT "D"

HOUSE OF REPRESENTATIVES

79th Congress

2d Session

Report No. 1651

The Committee on the Merchant Marine and Fisheries, to whom was referred the bill (H.R. 3973) to amend the act entitled "An act to provide reemployment rights for persons who leave their positions to serve in the merchant marine, and for other purposes", approved June 23, 1943 (57 Stat. 162) and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The purpose of the proposed bill is to provide reemployment rights for those persons who shall have served in the merchant marine between May 1, 1940, and the termination of the unlimited national emergency and who, within such period, shall have also served in the armed forces either prior or subsequent to their merchant marine service. The existing law creates a hiatus in the continuity of service of men who served in the armed services and are released from the armed services to serve in the merchant marine and also the same situation exists where seamen have left the merchant service in order to serve in the armed forces. Such persons at present are not included among those who are granted reemployment rights pursuant to Public Law

87, Seventy-eighth Congress, approved June 23, 1943 (57 Stat. 162) or the Selective Training and Service Act of 1940, approved September 16, 1940, by Public Law 783, Seventy-sixth Congress, as amended, or the Service Extension Act of 1941, approved August 18, 1941, by Public Law 213, Seventy-seventh Congress, as amended, since these acts grant such reemployment benefits to persons whose service is entirely within either the merchant marine or the armed forces.

Many experienced seamen who volunteered or were inducted into the armed forces have been released therefrom to serve in the merchant marine and other seamen have left the merchant marine in order to serve in the armed forces.

The reasons which prompted Congress to enact legislation providing reemployment rights for persons whose service has been entirely in the armed forces or the merchant marine are equally applicable with reference to persons with service in both.

The proposed legislation will also provide specifically for the inclusion in Public Law 87, Seventy-eighth Congress of civilian maritime personnel of the War Department to whom reemployment rights have been granted thereunder pursuant to an opinion as to their eligibility furnished by the Secretary of War.

The proposed change from 40 to 90 days within which a merchant seaman must make application for reemployment and the added provision for continuation of reemployment rights during hospitalization immediately after completion of service are substantially the same as is provided in Public Law 473, Seventy-eighth Congress, approved December 8, 1944 (58 Stat. 369) amending the Selective Training and Service Act of 1940.

The provision in section 2 (a) (A) of the proposed legislation continues reemployment rights to permanent positions without regard to whether or not such positions are covered into classified civil service during the period of military, naval or merchant marine service and is in accord with section 7 of the Service Extension Act of 1941.

Your committee are of the opinion that a hiatus exists in the law on these subjects and remedial legislation is necessary.

The second objective of this bill is to cover those persons who were the civilian employees of the War Department and in the Army Transportation Service. The bill is so worded it will provide for those persons. The civilian personnel of the Army Transport Service are not covered under the Selective Service Act or the Army Retirement or Reserve Army Service Law. They are not covered with unemployment rights similar to those available to the members of the armed services. They are under the civil service. They are not in the merchant marine and they should be accorded the same privileges otherwise granted. This bill will accomplish that purpose.

The third purpose of the bill is to extend the time for making application for reemployment of those persons who served in the merchant marine from 40-90 days. This is uniform with the Selective Service Act and those acts covering the armed service personnel.

Your committee recommend that the bill do pass.

House of Representatives

78th Congress—1st Session

Report No. 106

Leaves of Absence to Serve in the Merchant Marine

The purpose of the bill is to provide reemployment rights for persons leaving employment, whether private or Government, to serve in the merchant marine, in accordance with provisions for persons entering the armed forces of the United States.

The present bill is identical with H. R. 7744 as it was ordered reported by the committee, in the Seventy-seventh Congress. It was too near the adjournment of the Seventy-seventh Congress to permit consideration of the legislation by the House.

The bill would provide reemployment rights for persons leaving private or Government employment subsequent to May 1, 1940, and prior to the end of the unlimited national emergency declared by the President on May 27, 1941, to enter upon service in the merchant marine. Service in the merchant marine includes service of officers and seamen

on United States documented vessels or vessels owned, chartered, or operated by or for the War Shipping Administration, and service as a trainee or an administrative employee in the United States Maritime Service on active duty, and, as prescribed by the Administrator, periods of awaiting assignment to service or periods of training.

It is provided that any such person who, in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration, completes a period of continuous service in the merchant marine, shall be entitled to a certificate to that effect from the Administrator, upon completion of such period, which shall include a record of any special proficiency or merit obtained. If such person in order to perform service in the merchant marine has left, or leaves a position, other than a temporary position, in the employ of any employer, and if such person receives the certificate mentioned above, and if he is still qualified to perform the duties of such position, he may make application for reemployment within 40 days after completion of his service. If such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; or if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

Provision is made whereby the person's seniority rights and insurance or other benefits are protected, and such person is protected from discharge from such position without reasonable cause within 1 year after such restoration.

Section 3 provides a method for enforcing the reemployment rights and other benefits to persons who leave private employment to enter service in the merchant marine similar to that afforded men who enter the armed forces of the United States.

Section 4 provides that men leaving Government positions shall be entitled to any compensation from their civilian positions covering their accumulated or current leave in addition to any pay which they might receive for service in the merchant marine.

Section 5 provides that the Administrator, War Shipping Administration, may make such rules and regulations as he deems necessary or appropriate to carry out the provisions of the act.

The bill substantially conforms to the revision submitted by the Administrator, War Shipping Administrator, in his report on the predecessor bill, H. R. 7744. For the information of the Members of the House, the report mentioned, as well as the report of the Civil Service Commission, are appended below.

EXHIBIT "E"

U. S. War Shipping Administration. The United States Merchant Marine at War: Report of the War Shipping Administrator to the President.

(pp. 29-32) Washington, January 15, 1946.

"In summarizing the value of the United States Merchant Marine to the military and naval forces, and thereby fulfilling its role as an arm of the national defense, it is clear (page 29) that we must view the Merchant Marine as a whole—the ships, the administrative organization which included the industry, the part and repair facilities, the shipyards from which came the ships, the training program necessary to supply the thousands of men needed in addition to the reservoir of already experienced seamen—all a unified, flexible whole which resulted in an adequate cargo-carrying capacity available at the time, the place, and in enough strength to carry out the logistical processes of the greatest war in history.

In evaluating the service of the Merchant Marine to the military and naval establishments, the opinions of the men in command of the armed services should be considered.

On November 2, 1945, Fleet Admiral Ernest J. King, Commander in Chief of the United States Navy and Chief of Naval Operations, wrote to Admiral Land the following:

'During the past 3½ years, the Navy has been dependent upon the Merchant Marine to supply our far-flung fleet and bases. Without this support, the Navy (page 30) could not have accomplished its mission. Consequently, it is fitting that the Merchant Marine share in our success as it shared in our trials.

'The Merchant Marine is a strong bulwark of National defense in peace and war, and a buttress to a sound national economy. A large Merchant Marine is not only an important national resource; it is, in being, an integral part of the country's armed might during time of crisis. During World War II, this precept has been proved . . .'

Field Commanders knew the value of the Merchant Marine lifeline to their operations. Gen. Dwight D. Eisenhower said:

'Every man in this allied command is quick to express his admiration for the loyalty, courage, and fortitude of the officers and men of the Merchant Marine. We count upon their efficiency and their utter devotion to duty as we do our own; they have never failed us yet and in all (page 31) the struggles yet to come we know that they will never be deterred by any danger, hardship, or privation.

'When final victory is ours there is no organization that will share its credit more deservedly than the Merchant Marine.'

Gen. Douglas MacArthur said:

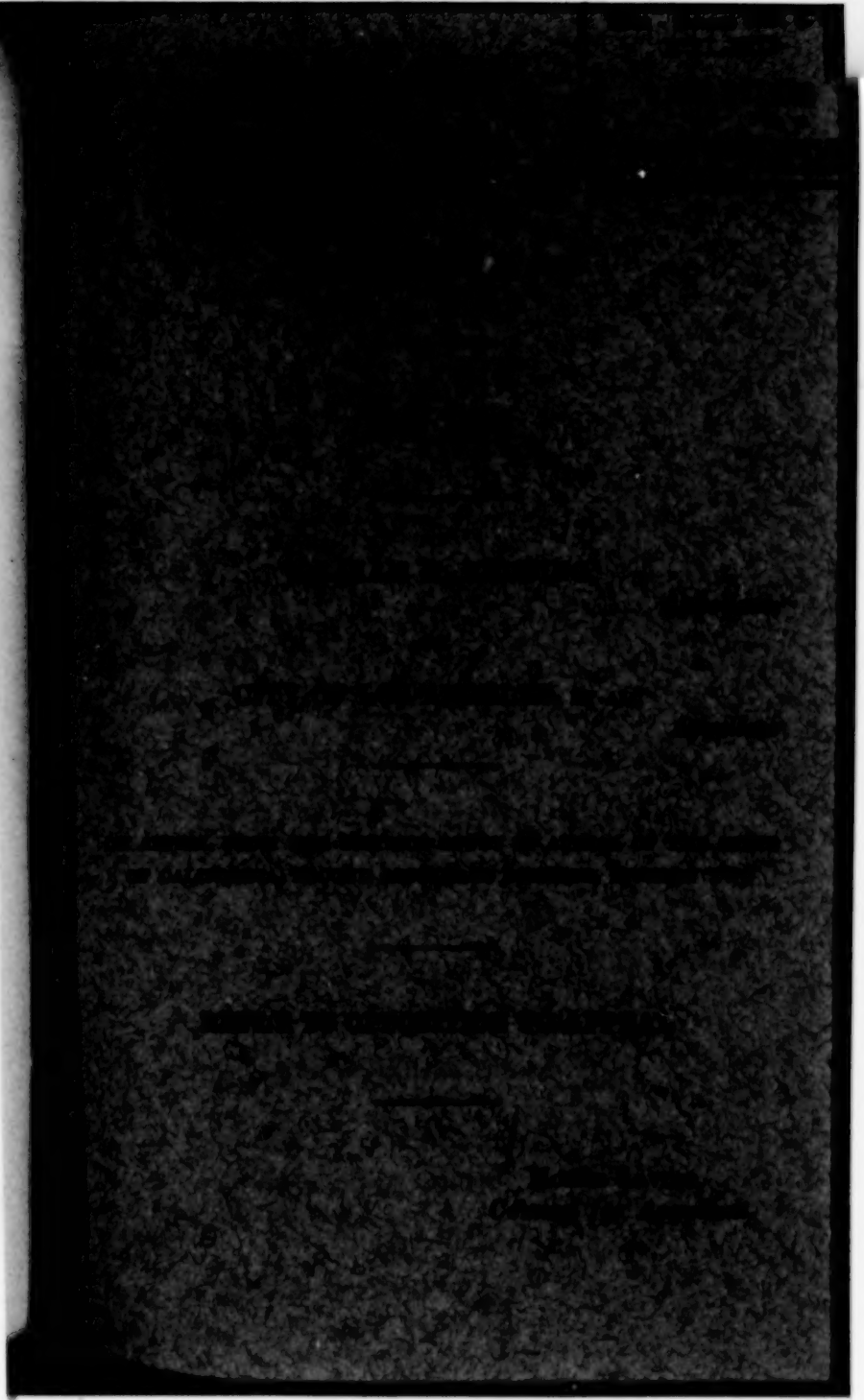
'I wish to commend to you the valor of the Merchant seamen participating with us in the liberation of the Philippines. With us they have shared the heaviest enemy fire. On this island I have ordered them off their ships and into fox holes when their ships became untenable targets of attack. At our side they have suffered in bloodshed and in death. The high caliber of

efficiency and the courage they displayed in their part of the invasion of the Philippines marked their conduct throughout the entire campaign in the southwest Pacific area. They have contributed tremendously to our success. I hold no branch in higher esteem than the Merchant Marine services.' " (page 32).

EXHIBIT "F"

Title 46, U. S. C. A., Section 1101. Fostering and Maintenance of Merchant Marine.

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. June 29, 1936, c. 858, Title I, sec. 101, 49 Stat. 1985.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 754

WILLIAM H. REDDING,

Appellant,

vs.

CITY OF LOS ANGELES, ET AL.,

Appellees

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

REPLY TO OPPOSITION TO APPEAL

The City of Los Angeles, in its opposition, has misconstrued the law and the facts. The attack in this case is upon the provisions of section 17 of the Charter of the City of Los Angeles, which Charter requires the approval of the State Legislature before it becomes law, and to the State law itself (Chap. 67, Statutes of California, 1941, p. 3405), all of which are construed by the California Court not to be bound by the Constitution and laws of the United States passed pursuant to it.

But the United States Constitution and the laws passed pursuant to it are the supreme law of the land.

U. S. Constitution, Article VI, sec. 2

The laws of the United States with reference to the Merchant Marine and the policy relating thereto, as shown by the Acts of Congress and the debates in Congress with reference thereto, became the policy of the State of California, which was not applied pursuant to the Constitution of the United States and the Acts of Congress. See *Testa* v. *Katt*, 330 U. S. 386.

Whether State courts and State administrative bodies may so construe other Charter provisions and statutes as to decline to enforce Federal laws and Federal policies expressed in those laws for the national defense are questions of great importance, which affect not only the individual petitioner, but all persons similarly situated, and the national policy. A local Charter provision, which has the force of a local law and is approved by State statute, comes within the meaning of State action.

Lovell v. *Griffin*, 303 U. S. 444.

To deny to petitioner relief in this case would be to deny to one who served in our national defense, in an all-out war which required the traveling and navigation of ships in troublesome waters, by men sworn to support and defend the Constitution, the rights and privileges which Congress intended them to have, and would place a local construction by a local Police Board above the powers and policy which Congress declared.

Since the Charter provision as construed and applied in this case is a State law or statute within the meaning and construction which this Court has given to that word, and since the statute has been construed contrary to and in

conflict with the Constitution and Acts of Congress with reference thereto, it is respectfully submitted that the appeal should be entertained by the Supreme Court of the United States.

To construe a city statute, to permit the holding that one who served the United States honorably in time of war, and in the torpedoed sea lanes of the South Pacific, is guilty of "neglect of duty" is to construe the national policy contrary to the specific intent which Congress intended it to have.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 754

WILLIAM H. REDDING,

Appellant,

vs.

CITY OF LOS ANGELES, HON. FLETCHER BOWRON AS MAYOR THEREOF; C. B. HORRALL, CHIEF OF POLICE; JOSEPH F. REED, ASSISTANT CHIEF OF POLICE; JAMES F. LAWRENCE, CHARLES R. MESLOH, B. R. STEED, HENRY S. EATON, BRUCE F. CLARK, ANTHONY COLLINS, THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES, JUSTIN W. GILLETTE, ROBERT M. HIXON, IDA S. LAZARD, SAMSON A. LINDAUER, DR. FREDERIC P. WOELLNER AND L. V. McCARDLE, AS TREASURER OF THE CITY OF LOS ANGELES,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

STATEMENT AGAINST JURISDICTION ON APPEAL

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 754

WILLIAM H. REDDING,

Appellant,

vs.

CITY OF LOS ANGELES, HON. FLETCHER BOWRON AS MAYOR THEREOF; C. B. HORRALL, CHIEF OF POLICE; JOSEPH F. REED, ASSISTANT CHIEF OF POLICE; JAMES F. LAWRENCE, CHARLES R. MESLOH, B. R. STEED, HENRY S. EATON, BRUCE F. CLARK, ANTHONY COLLINS, THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES, JUSTIN W. GILLETTE, ROBERT M. HIXON, IDA S. LAZARD, SAMSON A. LINDAUER, DR. FREDERIC P. WOELLNER AND L. V. McCARDLE, AS TREASURER OF THE CITY OF LOS ANGELES,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

STATEMENT AGAINST JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

The appellees suggest that this Court is without jurisdiction to review the above entitled cause on appeal,

and in support of such suggestion respectfully represent:

A

The Purported Appeal Herein Is Irregular and Invalid

The appeal has not been allowed in accordance with the requirements of Rule 36, and the appellant's jurisdictional statement does not conform with the requirements of Rule 12.

B

This Court Is Without Jurisdiction to Review the Judgment Below upon Appeal

No treaty or statute of the United States was declared invalid by such judgment, nor was any State statute there sustained against attack on Federal grounds.

C

If This Proceeding Be Viewed as a Petition for a writ of Certiorari, Such Writ Does Not Lie, for the Reason That There Is No Substance to the Alleged Federal Question upon Which the Decision of This Cause Is Asserted to Depend.

The appellant has no substantial claim that any Federal right or privilege was affected by the judgment below; indeed, the judgment below not only adequately, but entirely, rests upon State grounds.

In further support of such suggestion, the appellees respectfully state:

I

The Facts

The purported appeal herein is from a decision of the District Court of Appeal of the State of California, Second

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Appellate District, Division Two, affirming a judgment for the appellees and denying relief to the appellant in an action for a writ of mandate brought by the appellant against the appellees in the Superior Court of the Sate of California in and for the County of Los Angeles. The opinion of the District Court of Appeal is reported in 81 Advance California Appellate Reports at page 1055, and in 185 Pacific Reporter, 2d series, at page 430, and is attached to the appellant's jurisdictional statement as Appendix "A".

Mandamus had been sought in the Superior Court action to compel the appellees (the respondents there) to restore the appellant (the petitioner there) to a position, from which he had been discharged, in the Los Angeles police department. The appellees had demurred to the mandamus petition upon the ground that it stated no cause of action. The Superior Court had sustained the demurrer and entered its judgment for the appellees.

The facts of the case as disclosed by the mandamus petition were as follows: On September 6, 1942, the appellant was given military leave from his duties as an officer of the Los Angeles police department for the reason that he had been commissioned as an officer in the coast guard and ordered to active duty therein. On December 9, 1942, the appellant was honorably disenrolled from the coast guard and on the same day he shipped in the civilian crew aboard an army transport.

Thereafter, on January 9, 1943, the appellant enrolled in the United States Maritime Service, and after his disenrollment therefrom, he received a certificate from the War Shipping Administrator attesting to substantially continuous service in the merchant marine between January 9, 1943, and March 29, 1946.

Under the provisions of Section 17 of the Charter of the City of Los Angeles, (Chap. 67 Statutes of California 1941, p. 3405) as it read until 1945, a Los Angeles policeman

"called into active service in the armed forces of . . . the United States" during the war was considered as being on military leave of absence "during the period of such service . . . and for a period of ninety (90) days from and after his discharge or release from such service" and was entitled to return to his position within the time so designated. (The provisions of the said Section 17 are set forth verbatim by the appellant in Appendix "C" of his jurisdictional statement.)

The appellant was at no time during the war on active service in the armed forces of the United States, except as above stated. He did not apply for return to his position as a policeman until after February 1, 1946, more than three years after his release from active service in the armed forces. (One of the appellant's contentions seems to be that his employment in the merchant marine was active service in the armed forces of the United States. With this contention, of course, we do not agree.)

On August 3, 1943, a hearing was held by a Los Angeles police department board of rights, as provided by Section 202 of the City Charter, upon charges preferred by the Chief of Police that the appellant was guilty of neglect of duty for failure to return to duty within the time allowed him under the military leave provisions of Charter Section 17. The board of rights found the appellant guilty and recommended his removal, and thereupon the Chief of Police discharged the appellant from the police department. In February, 1946, the appellant asked the Chief of Police to allow him a rehearing. This request was granted, the previous proceedings were set aside, and the matter was heard before a new board of rights. At this hearing the appellant was present in person and by counsel. The new board found the appellant guilty as charged, and on April 30, 1946, recommended his discharge, whereupon the Chief of Police removed the appellant from the police department.

(The provisions of the said Section 202 of the Los Angeles City Charter are set forth verbatim by the appellant in Appendix "C" of his jurisdictional statement.)

For the purposes of this appeal, we shall treat the appellant's request to the Chief of Police for a rehearing by a board of rights as equivalent to a request by the appellant that he be restored to his former position as a city policeman.

Under the provisions of Public Law No. 87, Section 1472 of Title 50, Appendix U. S. C. (appellant's jurisdictional statement, Appendix "B") it is declared that as to a person like the appellant who left a position in the employ of a city to enter active military or naval service in the land or naval forces of the United States, was honorably discharged therefrom, and within thirty days thereafter entered upon service in the merchant marine, it is the "sense of the Congress" that he should be restored to his position with the city upon his return from service with the merchant marine.

II

The Question

Is a former city employee, as a matter of absolute right, under Federal law, entitled to be restored to the position with a city which he left to enter the armed forces, where, after his release from the armed forces, he failed to return to his position within the period stipulated by state law, but instead served with the merchant marine for three years before he requested that he be restored to his position with the City?

III

Summary of Argument

Point A. *The Purported Appeal Herein Is Irregular and Invalid.*

The appeal has not been allowed in accordance with the requirements of Rule 36, and the appellant's jurisdictional statement does not conform with the requirements of Rule 12.

Point B. *This Court Is Without Jurisdiction to Review the Judgment Below upon Appeal.*

No treaty or statute of the United States was declared invalid by such judgment, nor was any state statute there sustained against attack on Federal grounds.

Point C. *If This Proceeding Be Viewed as a Petition for a Writ of Certiorari, Such Writ Does Not Lie, for the Reason That There Is No Substance to the Alleged Federal Question upon Which the Decision of This Cause Is Asserted to Depend.*

The appellant has no substantial claim that any Federal right or privilege was affected by the Judgment below; indeed, the judgment below not only adequately, but entirely, rests upon state grounds.

IV

Argument

Point A. *The Purported Appeal Herein Is Irregular and Invalid.*

1. The said purported appeal has not been allowed, as provided by Rule 36, by the Chief Justice of the Supreme

Court of California, which is the state court of last resort in this cause, nor has any appeal herein been allowed by a Justice of this Court.

2. The jurisdictional statement filed by the appellant with his petition to the California District Court of Appeal for allowance of his appeal does not comply with the requirements of Rule 12 that such "statement shall include a statement of the grounds upon which it is contended the questions involved are substantial . . . , specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

Point B. *This Court Is Without Jurisdiction to Review the Judgment Below upon Appeal.*

1. *The Supreme Court has only such jurisdictional power upon appeal as is provided by the Congress.*

Constitution of the United States, Art. III, Sec. 2;
Missouri v. *Missouri Pac. Ry. Co.*, 292 U. S. 13, 15, 54 S. Ct. 569, 78 L. Ed. 1087.

2. *The Congress has provided for the review on appeal of judgments of state courts only where a treaty or statute of the United States has there been declared invalid, or where the appellant has there failed in his attack upon a*

state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

Jud. Code, Sec. 237(a) (Title 28, Sec. 344(a) U. S. C.); *Act of Jan. 31, 1928,* Chap. 14, 45 Stat. 54 (as amended by Act of April 26, 1928, Chap. 440, 45 Stat. 466).

3. *No treaty is here involved. No statute of the United States was declared to be invalid by the judgment of the state court.*

(a) The validity of a Federal statute is drawn in question when the existence, or constitutionality, or legality of such statute is denied, and the denial forms the subject of direct inquiry.

United States v. *Lynch,* 137 U. S. 280, 285, 11 S. Ct. 114, 34 L. Ed. 700

(b) The validity of a Federal statute is not denied by the mere denial of rights claimed under it, where such denial results merely from construction of the statute and its application to the facts of the case.

Perry v. *King County,* 141 U. S. 668, 673, 12 S. Ct. 128, 35 L. Ed. 895.

(c) Such denial in a state court of rights claimed under a Federal statute can be reviewed by the Supreme Court only on certiorari and not on appeal.

Jud. Code, Sec. 237(b) (Title 28, Sec. 344(b) U. S. C.); *Hopkins Federal S. & L. Ass'n* v. *Cleary,* 296 U. S. 315, 332, 56 S. Ct. 235, 80 L. Ed. 251, 100 A.L.R. 1403.

4. *The appellant did not attack any state statute on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.*

(a) There is no showing, attempted or otherwise, by the appellant in his jurisdictional statement, and it is not the

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fact, that the appellant at any time in the cause below claimed that any state statute was invalid, or claimed that the application, or enforcement, as to him, of any such statute, was repugnant to the Constitution or to Federal statute and therefore void.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239.

(b) Far from attacking any state statute, the appellant's case was based upon a state statute (Sec. 17, Los Angeles City Charter, *supra*, p. 4, appellant's jurisdictional statement, Appendix "C"). So far as the state statute was concerned (and, as well, so far as the Federal statutes were concerned) the problems at issue were entirely of construction and not of validity.

(c) There was in the court below no application or enforcement of a state statute against the appellant, to his disadvantage and in abridgement of any of his rights under Federal law. The state court's decision was, rather, that no state statute was of any help to the appellant. Such a holding could not be said to deny any Federal right, for if the appellant, under the facts of this case, had any Federal right of reemployment, he had it without reference to any statute of the state.

(d) If there was any denial of Federal right, review must be by certiorari and not by appeal.

Point C. *If This Proceeding Be Viewed as a Petition for a Writ of Certiorari, Such Writ Does Not Lie, for the Reason That There Is No Substance to the Alleged Federal Question upon Which the Decision of This Cause Is Asserted to Defend.*

1. *The appellant's discharge could not be set aside unless he had an absolute statutory right to reemployment.*

The discharge of the appellant from his position was effected in accordance with the provisions of the City Charter after a hearing by, and upon the recommendation of, a police department board of rights. The state court held that there was no such showing of abuse of discretion by that board as would authorize the court to substitute its judgment for that of the board. The only question in the case, then, was did the appellant have an absolute right, under either State or Federal law, to be restored to his position? If he did, then any consideration of the cause for his discharge, the proceedings before the board of rights, and all emotional considerations, became irrelevant, and the appellant's discharge was nugatory. If the appellant did not have such absolute right, his discharge by the Chief of Police was final.

If there were such absolute right, it had to arise from statute, for otherwise the right of the appellant's superior to discharge him would be complete and unimpeachable. (*Cronin* v. *Civil Service Comm.*, 71 Cal. App. 633, 236 Pac. 339.) The statutes relied upon by the appellant are Section 17, Los Angeles City Charter, The Merchant Marine Act, and Public Law 87.

2. *No such absolute right to reemployment was given to the appellant by Charter Section 17.*

Section 17 of the Los Angeles City Charter (*supra*, p. 4, appellant's jurisdictional statement, Appendix "C") applied only to those employees who returned to their jobs within ninety days after their release from active service in the armed forces of the United States, and the appellant's

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service in the merchant marine was not service in the armed forces.

Opinion below, 81 Adv. Cal. App. Reports, 1055;
In re Goodell, 57 N.Y.S. (2d) 754;
Opinions of Att'y Gen., N. Y., 1942, p. 395.

(a) Even though this Court, had it been sitting as the state court, would have reached a different conclusion on the construction of the state law, the conclusion reached by the state court is binding on this Court and is not reviewable here.

Taylor v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187;
Wilson v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 865.

(b) To be reviewable here, as on certiorari, there must be a showing of deprivation of a right secured by the Constitution or laws of the United States. No such right could arise from a city charter.

Jud. Code, Sec. 237(b) (Title 28, Sec. 344(b) U. S. C.)

3. *No such absolute right to reemployment was given to the appellant by the provisions of the Merchant Marine Act (Title 46, Sec. 1101, appellant's jurisdictional statement, Appendix "F").*

The appellant relies upon the statement contained in the Merchant Marine Act that it is the policy of the United States to foster the development of a privately owned merchant marine, manned with citizen personnel and "capable of serving as a naval and military auxiliary in time of war." On the basis of that statement, he asks this Court to hold that civilian personnel in the merchant marine have an absolute right to reemployment in former city jobs upon their disenrollment from the merchant marine.

The Act upon which such reliance is placed was adopted before the inception of the war, and is not concerned with any question of reemployment.

4. *No such absolute right to reemployment was given to the appellant by Public Law No. 87.*

Public Law No. 87 (*supra* p. 6, appellant's jurisdictional statement, Appendix "B"), by its terms, expresses merely the "sense of the Congress" that city employees should be restored to their positions upon their return from service with the merchant marine.

(a) The words of the statute can by no means be twisted into the creation of an absolute right of city employees to such reemployment.

(b) The reason that the Congress enacted this portion of the act as a recommendation instead of as a mandate was possibly because the Congress considered that it was without power to enact any such mandate. This is probably true.

Kotch v. *River Port Pilots*, 91 L. Ed. 826 (Adv. Op. 3/31/47), 330 U. S. 552;
Oklahoma v. *U. S. Civil Service Comm.*, 91 L. Ed. 537, (Adv. Op. 2/10/47), 330 U. S. 127.
Taylor v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187;
Wilson v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 865;
Newton v. *Mahoning County*, 100 U. S. 548, 25 L. Ed. 710;
Cummings v. *Missouri*, 4 Wall. 277, 18 L. Ed. 356;
Butler v. *Pennsylvania*, 10 How. 402, 13 L. Ed. 472.

(c) However that may be, in the act in question the Congress did not attempt to exercise any such power, and this Court could not now declare that a policy suggested by the Congress has the effect of declared law and is binding upon

the states as a matter of law. When Congress merely expresses a hope or wish that the states will conform, such expression cannot be construed as though it were mandatory and binding, especially where Congress in language as clear and unambiguous as could be found, negatives any such intention.

The cases believed by the appellant to sustain jurisdiction herein are not in point. They stand for the proposition that when the Constitution or the Congress declare or create a *right* state courts cannot refuse to enforce the *right* arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers, and that rights arising from the Constitution or under any act of Congress may be enforced as of right in the courts of the states. This principle has no application to the case at bar for the very good reason that in Public Law 87 Congress meticulously refrained from creating any right so far as employees of states and political subdivisions thereof were concerned. Congress left it to the states and their subdivisions, through legislative action, to determine the policy to be followed with reference to their employees.

(d) The adoption by the states or their political subdivisions of the policy expressed by Congress in Public Law 87 is a matter for legislative, rather than judicial, determination.

This principle, which has been followed uniformly by courts throughout the United States, is aptly and concisely expressed in the following language quoted from 11 American Jurisprudence, at page 814:

> "The public policy of a state is to be found in its constitution and statutes. Only in the absence of any declaration in these instruments may it be determined

> from judicial decisions. In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned." (Citing *Northern Pac. Ry. Co.* v. *Richland County* (North Dakota, 1914), 148 N. W. 545 at 547, and other cases.)

In the License Tax Cases, 5 Wall. 462, 18 L. Ed. 497, it was urged that certain statutes were against public policy. Speaking for the court, Chief Justice Chase said:

> "This court can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the Legislature. Questions of policy, determined there, are concluded here."

In *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 75 L. Ed. 1112, this court said:

> "Primarily it is for the lawmakers to determine the public policy of the State."

In *Baker* v. *United States,* 27 F. (2d) 863, (certiorari denied, 278 U. S. 656, 73 L. Ed. 565) the court said:

> "We must hold, then, that the decision of Congress is the final word in reference to what constitutes public policy in all matters confided to it by the Constitution or law."

5 California Jurisprudence, at pages 670 and 671, contains the following:

> "The power to determine what is necessary and appropriate legislation to accomplish the ends of gov-

ernment must necessarily be lodged in some body or department, and, by the same necessity, that body must be the legislature, or the law-making power. What is for the public good, and what are public purposes, are questions which the legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts except perhaps where its action is clearly evasive . . .

"Nonaction of Legislature.—Though it is within the legitimate power of the judiciary to declare the action of the legislature unconstitutional where that action exceeds the limits of the supreme law, yet the courts have no means, and no power, to avoid the effects of nonaction. The legislature being the creative element in the system, its action cannot be quickened by the other departments."

So here neither the Legislative authority of the state, in the Los Angeles City Charter, nor the national legislature, in Public Law No. 87, created any right in the appellant to be reemployed after his return from service in the merchant marine. Each of them did make certain provisions for reemployment after absences arising out of the war, and it must be assumed that they provided for all classes of former employees which they wished to benefit or protect, and deliberately omitted to extend such benefits further. The legislature having so omitted to act, the appellant now asks this Court to create such right of reemployment in him. This the Court cannot do, for its has no legislative power.

V

Conclusion

There is no jurisdiction in this Court to review the judgment of the court below on appeal and, if the matter should

be regarded as before this Court on certiorari, no Federal question of substance is presented.

Respectfully submitted,

RAY L. CHESEBRO,
City Attorney, City of Los Angeles,
BOURKE JONES,
Assistant City Attorney,
GEORGE WILLIAM ADAMS,
Deputy City Attorney,
Attorneys for Appellees,
By BOURKE JONES,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term 1947

No. 754

WILLIAM R. REDDING,

Appellant,

vs.

CITY OF LOS ANGELES, *et al.*,

Appellees.

PETITION FOR REHEARING.

Comes now appellant, William R. Redding, and petitions for a rehearing upon the following grounds, to-wit:

I.

The Court has dismissed the appeal upon the following ground:

> "The appeal is dismissed for want of a *substantial Federal question.*"

II.

The Court erred in its holding as to what is a substantial Federal question. Title 28, Sec. 344, gives the appellant the right of appeal where a state statute is involved, where is drawn in question "the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, *or laws of the United States.*"

The City Charter of Los Angeles and the state statute of California were construed in conflict with an Act of Congress relating to the preservation of jobs of persons who served faithfully in the Merchant Marine and the encouragement of that service. Such a claim distinctly sets out a substantial Federal question.

Green Bay & M. Canal Co. v. Patten Paper Co., 172 U. S. 58, 43, L. Ed. 364;

St. Louis I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179;

Murray v. Joe Gerrick & Co., 291 U. S. 315, 78 L. Ed. 821;

Senn v. Tile Layers P. L. No. 5 et al., 301 U. S. 468, 81 L. Ed. 1229.

The Federal questions were raised in the court below and passed on in the court below.

Cockroft v. Vose, 14 Wall., 81 U. S. 5, 20 L. Ed. 875;

Sevier v. Haskell, 14 Wall., 81 U. S. 12, 20 L. Ed. 827;

Hurley v. Street, 14 Wall., 81 U. S. 85, 20 L. Ed. 786.

A municipal ordinance is a statute within Title 28, Sec. 344.

Jamison v. Texas, 318 U. S. 413, 87 L. Ed. 869.

This Court has held that the question of national policy as declared by the Act of Congress governs all the

states. It has so held in an O. P. A. case. Certainly it is important to so hold on the question of the development and expansion of the Merchant Marine.

Testa v. Katt, 91 L. Ed. 776.

It is respectfully submitted that this Court has erroneously construed the definition and meaning of a "substantial Federal question" as applied to this case, and that Congress has allowed the right of appeal under Title 28, Sec. 344, U. S. Codes, where the Federal question was raised in the state court and determined by the state court adversely to the claim of petitioner on the question of his job.

The Federal question, as shown by the decision of the state court, was squarely presented to the trial court and the District Court of Appeal, and on petition for hearing in the Supreme Court of the State of California. The decision of the California courts decided squarely against the claim of right under the laws of the United States. It thus appears affirmatively from the record, "not only that a Federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, Lynch v. New York, 293 U. S. 52, 54, 79 L. Ed. 191, 192, 55 S. Ct. 16, and cases there cited. Whether these requirements have been met is itself a Federal question."

Honeyman v. Hanan, 300 U. S. 14, 18, 81 L. Ed. 479.

Not only was the Federal question argued and presented to the state court for decision, but it was actually decided and the judgment as rendered could not have been given without deciding it.

Commercial Nat. Bank v. Buckingham, 5 How. 341, 12 L. Ed. 180;

Lawler v. Walker, 14 How. 154, 14 L. Ed. 366;

Mississippi & M. R. Co. v. Rock, 4 Wall. 180, 18 L. Ed. 382;

Parmelee v. Lawrence, 11 Wall. 38, 20 L. Ed. 49.

Where there has been explicit and timely insistence in the state courts that a state statute (including a municipal ordinance or charter provision), as applied, is repugnant to the Federal Constitution, treaties or laws, and that question has been decided contrary to the contentions of the claimed invalidity, it presents a proper question of substance on appeal.

Charlestown Fed Sav. & Loan Assoc. v. Alderson, 324 U. S. 182, 185, 89 L. Ed. 857, 860, and cases therein cited;

Title 28, Sec. 344(a) (Sec. 237(a) of the Jud. Code).

We respectfully submit that a Federal question was raised and presents one of substance regarding a member of the Merchant Marine.

This case involves virtually a "death sentence" to a former police officer who served faithfully and honorably in the United States Coast Guard and thereafter went into the Merchant Marine, where he received a certificate

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of honorable service. Nevertheless, he is the only police officer who is charged with "neglect of duty" for having so served and the only officer whose name is not on the honor roll and who has lost all of his pension rights by reason of having performed so faithful a service to the United States Government. Under the Federal statutes as to the policy of the Government regarding persons who served in the Merchant Marine, we respectfully submit that the construction and application of the statute itself presents a Federal question of substance and that a rehearing should be granted. This is itself a substantial Federal question.

Honeyman v. Hanan, 300 U. S. 14, 18.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

Certificate of Counsel.

Morris Lavine, counsel for petitioner, hereby certifies that this petition for rehearing is taken in good faith and not for purposes of delay, and further certifies that it is based on a matter occurring since the filing of the original petition, to-wit: the order of this Court dismissing the appeal "for want of a substantial Federal question," which appeal had been allowed by the District Court of Appeal, and this petition is a request for a rehearing regarding the order of this Court with respect to whether this is a substantial Federal question, and is restricted to the grounds above specified.

MORRIS LAVINE.

MAY 24, 1948.

Per Curiam Decision.

No. 754. REDDING *v.* LOS ANGELES ET AL. Appeal from the District Court of Appeal, 2d Appellate District, of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Morris Lavine* for appellant. *Ray L. Chesebro* and *Bourke Jones* for appellees. Reported below: 81 Cal. App. 2d 888, 185 P. 2d 430.